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No. 91-730

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DON R. HILTON,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

FOREWORD iv

SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS 3

REASONS FOR DENYING THE WRIT 8

I. HILTON IS NOT A "HANDICAPPED PERSON" AS THAT TERM IS EMPLOYED UNDER THE ACT 9

(a) The Definition of "Handicapped Person" .. 9

(b) No Evidence That Hilton is Handicapped 10

II. HILTON WAS NOT DISCRIMINATED AGAINST BECAUSE HIS CONDITION IMPAIRS HIS ABILITY TO REASONABLY PERFORM HIS JOB 14

III. THE FIFTH CIRCUIT MET ITS OBLIGATIONS UNDER *ERIE* BY APPLYING TEXAS LAW TO ITS ANALYSIS OF THIS CASE 15

(a) The Fifth Circuit was Faithful to the Act 16

(b) The Fifth Circuit Considered the Opinion of the Texas Attorney General Interpreting the Act 17

(c) The Fifth Circuit was Faithful to Texas Case Law 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938) 8

Casso v. Brand, 776 S.W.2d 551 (Tex. 1989)..... 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....20, 21

Chevron Corporation v. Redmon, 745 S.W.2d 314 (Tex. 1987) 10, 17, 18, 19

County of Harris v. Eaton, 573 S.W.2d 177 (Tex. 1978)..... 16

Finney v. Baylor Medical Center Grapevine, 792 S.W.2d 859 (Tex. App. – Ft. Worth 1990, writ ref'd) 19, 20

Gates v. Dow Chemical Co., 777 S.W.2d 120 (Tex. App. – Houston [14th Dist.]), *vacated, set aside, dism'd*, 783 S.W.2d 589 (Tex. 1989) 20

Hightower v. State Com. of Education, 778 S.W.2d 595 (Tex. App. – Austin 1989, no writ)..... 17

Hilton v. Southwestern Bell Telephone Company, 936 F.2d 823 (5th Cir. 1991)(per curiam)..... *passim*

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)..... 18

STATUTES

Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987)..... 10

29 U.S.C. § 706(8) 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Equal Employment Opportunity Commission Regulations, 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) 14

Fed. R. Civ. P., Rule 56 21

Tex. Atty. Gen. Op. No. JM-648 (March 19, 1987) 17

FOREWARD

Citations to the transcript of the August 4, 1989 hearing on Petitioner's motion for a preliminary injunction (Volume 7 of the Record on Appeal) are made by the letters "Tr." followed by the page number on which the citation appears; thus, "Tr. 37-40" refers to pages 37 through 40, inclusive, of the transcript.

Citations to the exhibits admitted into evidence at the August 4, 1989 hearing are made by either "Plt. Ex." (meaning the Plaintiff-Petitioner's Exhibit) or "Def. Ex." (meaning Defendant-Respondent's Exhibit); thus, "Def. Exs. 11, 15-17" refers to Respondent's Exhibits Nos. 11 and 15 through 17, inclusive.

Citations to the Record on Appeal are made by the letter "R." followed by the volume of the record and the page number on which the citation appears. Exhibits offered by the parties in support of or in opposition to Respondent's motion for summary judgment, whether or not attached to affidavits, are made by reference to the page number of the record at which they appear. The unnumbered side of double-sided documents in the record are referenced by the letter "a." Thus, "R. 2:235-367a" refers to volume 2 of the record, pages 235 through the backside of page 367.

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SUMMARY OF THE ARGUMENT

The trial court and the Fifth Circuit applied Texas law. Throughout the prosecution of his case, Petitioner Hilton has sought the imposition of federal handicap discrimination law, not Texas law. Hilton has also misinterpreted the leading Texas case defining the terms "handicap" and "handicapped person" and has erroneously relied on an out-dated opinion of the state's former Attorney General.

Under Texas law, the terms "handicap" and "handicapped person" have specific meaning. In interpreting

the meaning of these terms, the Texas Supreme Court has expressly rejected the definitions employed under the federal handicap discrimination law. Under the statute in question, Hilton must actually be handicapped, as opposed to being perceived as such. To be handicapped, a person must be either mentally or physically handicapped. To be physically handicapped, a person must have a physical impairment of the same nature as the illustrative impairments listed in the statutory definition and that physical impairment must severely limit the performance of work-related functions in general.

Hilton is not handicapped under the Texas statute. Hilton is physically able to perform job related tasks. Nevertheless, Hilton is medically disabled because his extremely low blood platelet count condition makes the daily activities associated with even sedentary employment life threatening and, consequently, Hilton should not work as a medical precaution. As Hilton is not physiologically impaired and is not otherwise severely physically or mentally limited in performing work-related functions in general, Hilton is not handicapped under Texas law.

Hilton is also barred from recovery in this case because, under the express terms of the statute in question, Hilton cannot maintain a suit for discrimination if he is unable to reasonably perform the job. As Hilton's medical condition makes the performance of any sedentary job with Respondent SWBT life threatening, Hilton is unable to reasonably perform his job.

STATEMENT OF FACTS

Southwestern Bell Corporation has established certain non-contributory disability plans for its employees. (R. 2:218-219.) Southwestern Bell Telephone Company ("SWBT") is a participating company in those disability plans. (R. 2:218-219.) The Southwestern Bell Corporation Sickness and Accident Disability Benefit Plan ("Sickness Plan") provides up to 52 weeks of sickness disability benefits for employees who have at least six months of service and who are totally disabled from available telephone company work. (R. 2:236-237, 274-275.) The Sickness Plan is often informally referred to as the "short term disability" plan. Nonsalaried employees who exhaust sickness disability benefits under the Sickness Plan may apply for benefits under the Southwestern Bell Corporation Long Term Disability Benefit Plan for Nonsalaried Employees ("Long Term Plan"). (R. 2:295, 297-298.) Medical expenses are provided under separate plans for both active and retired employees. (R. 5:154-171a.) For the purposes of medical coverage, a former employee receiving benefits under the Long Term Plan is treated on the same basis as a retired employee. (R. 5:127a.)[1]

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[1] In Hilton's Petition for Writ of Certiorari, Hilton claims that his termination "has deprived him of the opportunity to acquire medical care which may prolong his life." (Petition, p. 5, n. 2.) As a recipient of Long Term Plan benefits, Hilton is given the same medical coverage provided to retired employees. That coverage is the same level of medical coverage provided to SWBT's active employees. If Hilton has been denied coverage under the medical plan on account of any exclusion (such as those applying to experimental or investigatory treatment), he would also be denied such coverage as an active employee.

All of SWBT's employees who exhaust their Sickness Plan benefits and who apply for and are approved for benefits under the Long Term Plan are effectively terminated by their removal from the active payroll. (R. 2:219, 302; R. 5:223a.) The Long Term Plan is the subject of an agreement entered into by and between SWBT and the Communications Workers of America ("CWA"), Hilton's sole collective bargaining agent. In that agreement, dated August 10, 1986, SWBT consented to provide a long term disability plan substantially in accordance with Attachment A annexed to that agreement, which reads in pertinent part as follows:

> An individual covered under the plan after the expiration of sickness disability benefits is considered a former employee and as such has no guarantee of reemployment if no longer disabled.

(R. 5:108-112.)

In October 1986, Petitioner Don R. Hilton ("Hilton") was a nonsalaried employee of SWBT, employed as a Drafting Clerk in the Engineering Design section of SWBT's Network Distribution Services Department. (R. 2:215.) Due to a knee injury (unrelated to Hilton's later diagnosed HIV condition), Hilton was given the Drafting Clerk position because he was unable to climb telephone poles. (R. 4:53-55, 61-65.) From on or about October 31, 1986, Hilton was absent from work claiming total disability due to a medical condition. (Tr. 76; Def. Ex. 4; R. 4:56-57.)[2] In accordance with the terms of the Sickness

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[2] In his Petition, Hilton implies he was involuntarily placed on disability. This is incorrect. Hilton advised SWBT that he was disabled and chose to absent himself from the work place on advice of his treating physician.

Plan, Hilton began receiving sickness disability benefits on November 7, 1986. (R. 2:238.)

From and including November 3, 1986 to and including September 23, 1987, Hilton's treating physician, Terry Pulse, M.D., submitted at least twelve separate documents substantiating Hilton's total disability from work. (Tr. 65-68; Def. Exs. 3-11, 13, 15, 21-22.) Hilton's disability was described by Dr. Pulse as "HIV+/ARC with Thrombocytopenia/ITP." (Tr. 52-53, 98; Def. Exs. 3-11, 13, 15, 21-22.) "Thrombocytopenia" or "ITP" is a low blood platelet count condition which Dr. Pulse described as "LIFE-THREATENING!" when Hilton had a platelet count of 14,000/mm^3. (Def. Ex. 5.) The normal blood platelet count range is from 140,000 to 250,000/mm^3. (Tr. 101.)

In August 1988, Hilton was directed to submit to an independent medical consultation to confirm his treating physician's opinion that he was totally disabled from his sedentary job with SWBT. (Tr. 111-115.) On August 18, 1987, Hilton was seen for an independent medical consultation by Brady L. Allen, M.D., a doctor of internal medicine. (Tr. 114-115.) In his report dated August 20, 1987, Dr. Allen reported that Hilton was "totally disabled at this point secondary to rather severe ARC." (Tr. 115-119; Def. Ex. 19.)

On October 1, 1987 (near the end of Hilton's 52 weeks of sickness disability benefits), Hilton advised his supervisor, Ms. Patricia Smallwood, that his doctor (Dr. Pulse) had released him to return to work and that Hilton was returning to work. (Tr. 17, 77-79.) Hilton was advised that he should not return to work until further notification

and that another medical examination and consultation was being scheduled. (Tr. 77-78; R. 2:311-312, 315.)

On October 2, 1987, Hilton was examined by a second independent medical consultant, James R. Farris, M.D. (Tr. 122-124; Def. Ex. 27; R. 2:325.) In that examination, Hilton was found to have had a blood platelet count of only 6,000/mm^3. (Tr. 126; Def. Ex. 27; R. 2:325-326, 331.) In his report, Dr. Farris advised that, due to the "severity of this patient's [Hilton's] thrombocytopenia [low blood platelet count]," Hilton could not be returned to work and that even sedentary job duties were implausible. (Def. Ex. 27; R. 2:325-326.) As a result of Dr. Farris' examination and report, previous medical examinations and laboratory test results and other information available to SWBT's Benefit Office as to Hilton's disability status, James T. Wheeler, M.D., SWBT's Medical Advisor, advised Hilton's department that Hilton remained totally disabled from his sedentary position with the company. (Tr. 128-129; R. 1:215-216.) Management accepted the medical advice of the consultants and Dr. Wheeler and, on October 16, 1988, advised Hilton of its decision not to allow him to return to work due to his medical disability.

Due to Hilton's extremely low blood platelet count of 6,000/mm^3 in October 1987, Hilton was unable to reasonably perform the duties of his Drafting Clerk job with safety and, had Hilton been required to undertake the obligations of regular employment with SWBT, Hilton would have been exposed to a substantial risk of serious bodily injury or death. (Tr. 128-133; Def. Ex. 27; R. 2:323-350.)

Hilton filed his action on October 10, 1988 in the state district court of Dallas County, Texas. SWBT removed the action pursuant to a Petition of Removal filed November 21, 1988. Hilton filed a motion for injunctive relief and a hearing was held on August 4, 1989 on that motion. After the August 4 hearing but before the trial court ruled on the motion, SWBT timely filed a motion for summary judgment. In that motion, SWBT asserted five separate grounds for a judgment in its favor. In the motion, SWBT contended that Hilton was not "handicapped" as that term is employed in the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987)[3] ("Act"); that Hilton failed to file timely his administrative complaint with the Texas Commission on Human Rights ("Commission"); that there is no evidence rebutting SWBT's legitimate, non-discriminatory reason proffered in explanation of its conduct in question (that is, there is no evidence that SWBT discriminated against Hilton or otherwise committed an "unlawful employment practice"); that Hilton's termination was made pursuant to a bona fide employee benefit plan which is not a subterfuge to evade the provisions of the Act; and, that

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[3] The Act was amended in 1989 by the 71st Texas Legislature. The amendments include changes to the statutory definitions of "handicap" and "handicapped person" at issue in this case. Those amendments did not go into effect until September 1, 1989. As all alleged unlawful employment practices took place during the months of October and November 1988, the Act in existence at that time, including the statutory definitions of "handicap" and "handicapped person," governs Hilton's alleged claims.

Hilton's common law claim for alleged wrongful discharge failed to state a claim under Texas law upon which relief could be granted and any such alleged claim was preempted by federal law.

The trial court granted SWBT's motion for summary judgment with respect to Hilton's alleged claim for wrongful discharge and with respect to the alleged violations of the Act. Hilton's claim for wrongful discharge was dismissed because his claim was preempted by federal law. Hilton's claims for violations under the Act were dismissed because Hilton was found as a matter of law not to be a "handicapped person."

On appeal to the United States Court of Appeal for the Fifth Circuit, Hilton challenged the trial court's determination that he was not handicapped. SWBT filed a cross-appeal raising the three remaining issues argued in its motion for summary judgment applicable to Hilton's claim of violations under the Act. In affirming the trial court, the Fifth Circuit never reached the issues raised in SWBT's cross-appeal. *Hilton v. Southwestern Bell Telephone Company*, 936 F.2d 823, 825 n.2 (5th Cir. 1991)(per curiam). Any decision by this Court with respect to the Fifth Circuit's decision affirming the trial court's judgment must take into consideration the right of SWBT to be heard on those issues raised in its cross-appeal.

REASONS FOR DENYING THE WRIT

Simply stated, Hilton's Petition should be denied because, contrary to his assertion, the Fifth Circuit did not abdicate its obligations under *Erie RR. Co. v. Tompkins*,

304 U.S. 64 (1938), to apply the substantive law of Texas in this diversity jurisdiction case. What is described in Hilton's Petition for Writ of Certiorari as a "niggling" interpretation of the Act is in fact a careful and well-reasoned application of Texas law to this case. (Hilton's "Petition for Writ of Certiorari," p. 6.)[4] Even a cursory review of the record shows that there has been no breach of the appellate court's duty under *Erie*.

I. HILTON IS *NOT* A "HANDICAPPED PERSON" AS THAT TERM IS EMPLOYED UNDER THE ACT.

Throughout the course of this litigation, Hilton has acted as if the terms "AIDS" and "ARC" were verbal talismans, the mere invocation of which would establish his entitlement to relief under the Act. Hilton is mistaken.

(a) The Definition of "Handicapped Person"

The definition of "handicapped person" is found in Article 2, Section 2.01(7)(A) of the Act and reads in pertinent part:

> (7)(A) "Handicapped person" means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services, ...

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[4] Hilton's Petition for Writ of Certiorari will be referred to as simply "Petition."

Tex. Rev. Civ. Stat. Ann. art. 5221k § 2.01(7)(A) (Vernon 1987). The meaning of this definition was discussed in *Chevron Corporation v. Redmon*, 745 S.W.2d 314 (Tex. 1987). The *Chevron* opinion is particularly important to this action for three reasons: (1) the Texas Supreme Court held that the definition of "individual with handicaps" found in the federal Rehabilitation Act, 29 U.S.C. § 706(8), (the "Rehabilitation Act") was *not* applicable to the Act; (2) the court held that a plaintiff seeking relief under the Act must prove that he is *in fact* a handicapped person as that term is used in the Act (as opposed to merely being "perceived" as such); and, (3) the court set out a minimum guideline by which the issue of whether a person is a "handicapped person" under the Act may be evaluated. *Id.*, at 318. In stating this minimum guideline, the *Chevron* court instructed that "[w]hile under article 5221k, a person may not sue if his handicap impairs his ability to do *that* particular job, in order for a disability to be considered a handicap in the first place it must be one which is generally perceived as severely limiting him in performing work-related functions in general." *Id.*

(b) No Evidence That Hilton is Handicapped

A review of the evidence offered in support of SWBT's motion for summary judgment, as well as that presented at the hearing on Hilton's motion for preliminary injunctive relief, shows that Hilton claims no limitation on his ability to perform work-related functions at all. (Tr. 38-39, 167, 169-170.) This is consistent with the medical record which is beyond dispute. That record shows that Hilton's disability is the result of his

extremely low blood platelet count which is such that increased activity in and of itself presents a substantial risk of severe bodily injury or death. (Tr. 128-133; Def. Ex. 27; R. 2:323-350.) In short, the disease process is not one which makes Hilton physically or mentally unable to perform work-related functions in general but rather means that Hilton should not perform those functions because the concomitant increase in daily activities presents a substantial risk of serious bodily injury or death.

The medical doctors all agree that Hilton's ITP condition presents a very substantial risk of serious bodily injury or death. Hilton's own treating physician (Dr. Pulse) advised that Hilton was totally disabled from his sedentary job as a drafting clerk when his blood platelet count was 14,000/mm^3. In a written statement to substantiate Hilton's disability status, Dr. Pulse asserted that a blood platelet count of 14,000/mm^3 was "LIFE THREATENING!" On the basis of that diagnosis, SWBT paid Hilton sickness disability benefits and excused his absence from work for almost twelve months. Moreover, in his deposition, that same doctor, Dr. Pulse, testified that, even with sedentary jobs, persons with blood platelet counts below 50,000/mm^3 "ought to really seriously consider not working"; that persons with counts below 30,000/mm^3 are becoming "critical"; and, that persons with counts below 12,000/mm^3 have "got real problems." (R.4:102.) At the time that SWBT decided that Hilton was still disabled in October 1987, Hilton had a blood platelet count of 6,000/mm^3, less than half the count that Dr. Pulse described as life threatening. (Tr. 124-126.) No evidence was ever offered by Hilton challenging this finding.

In his Petition, Hilton asserts that SWBT agrees with him that Hilton's condition is "one which generally *is* perceived as severely limiting one's work-related functions," citing the opinion of the Fifth Circuit.[5] (Petition, p. 7, emphasis supplied by Hilton.) Hilton is mistaken. SWBT has never conceded that Hilton's condition is one which is generally perceived as severely physically or mentally limiting his performance of work-related functions. The source of Hilton's error is his own distortion of the testimony of James T. Wheeler, M.D., SWBT's Medical Advisor. Hilton takes Dr. Wheeler's testimony out of context and argues that Dr. Wheeler, and thus SWBT, concede that Hilton's condition meets the *Chevron* guideline. Hilton's argument is the height of sophistry.

In the snippet of Dr. Wheeler's testimony cited in Hilton's Petition, Dr. Wheeler states that, in his opinion, Hilton's condition would severely limit his work-related functions. (Petition, p. 8; Tr. 142.) In order to understand Dr. Wheeler's testimony it must be read in context. Dr. Wheeler never acknowledged any physical or mental limitations on Hilton's ability to perform work. Without equivocation, Dr. Wheeler's testimony is that Hilton is medically disabled from work due to the limitations on his daily activities imposed by the substantial risk of

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[5] Hilton takes the Fifth Circuit's language out of context. The reference in the Petition is to a statement in the opinion in which the court recaps *Hilton's* argument, not SWBT's argument. 936 F.2d at 829. The court is simply arguing that even if Hilton's prior assertions were correct, Hilton still cannot prevail because Hilton's condition affects his ability to reasonably perform the job in question.

serious bodily injury or death created by his ITP condition. The normal bumps and grinds that everyone else takes for granted are all potentially death producing events for Hilton. This medical precaution imposed on Hilton limits his ability to perform any work, even sedentary work. Thus, while Hilton is arguing that Dr. Wheeler agrees that his condition severely limits him *physically* in performing work-related functions in general, Dr. Wheeler is actually testifying that the medical condition requires Hilton to refrain from all work and that his condition therefore limits him *prudentially* from performing work-related functions.

What is truly interesting about Hilton's specious argument is that, on the one hand, he embraces Dr. Wheeler's testimony (that he is limited in performing work-related functions) and, on the other hand, totally rejects the medical opinion underlying that testimony (that Hilton's ITP condition renders Hilton medically disabled from sedentary work because the increased daily activity associated with it places Hilton in substantial risk of serious bodily injury or death). Hilton cannot have it both ways.

Such duplicitous reasoning is at the very heart of Hilton's case. Hilton was content to rely on his status as a disabled employee, to be excused from work and to be paid sickness disability benefits due to his ITP condition when it was a matter of the Sickness Plan. But disability absence and being paid disability benefits for the same condition is not acceptable to Hilton when it is a matter of the Long Term Plan. Furthermore, Hilton seeks to embrace the limitations imposed by the ITP condition on his "work-related" functions when that means he is a

"handicapped person" but is not willing to accept the implications of his ITP condition when it means that he cannot return to his sedentary job with SWBT due to the very real risk of serious bodily injury or death.

II. HILTON WAS NOT DISCRIMINATED AGAINST BECAUSE HIS CONDITION IMPAIRS HIS ABILITY TO REASONABLY PERFORM HIS JOB

The evidence in this case confirms that SWBT had a legitimate, non-discriminatory reason for its decision not to allow Hilton to return to work in October 1987. The record is equally clear that there is no evidence that SWBT was in error in October 1987 in determining that Hilton was not able to reasonably perform his job because his ITP condition exposed him to a substantial risk of serious bodily injury or death if he were to engage in the increased activities associated with the daily aspects of regular employment, even sedentary employment.[6] The Fifth Circuit was correct in holding that, under the Act, it is not an unlawful employment practice for an employer to exclude a person from a job because of a substantial risk of serious bodily injury or death to the employee. *Hilton*, 936 F.2d at 830-831.

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[6] The newly finalized regulations propounded by the federal Equal Employment Opportunity Commission for enforcement of the Americans with Disabilities Act, 42 U.S.C. § 12101, also recognizes the right of employers to determine whether an employee can perform a job without exposing himself to a substantial risk of serious bodily harm or death. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

The decision not to allow Hilton to return to the work place was only made after nearly twelve months of constantly monitoring Hilton's medical condition. Dr. Wheeler and Dr. Pulse conferred during Hilton's twelve-month sickness disability absence with respect to his condition and the appropriate treatment. (R. 4:101.) Dr. Wheeler had Hilton submit to two independent medical consultants to confirm his opinion that someone with a severe case of ITP should not engage in sedentary work. Dr. Wheeler himself is a hematologist/oncologist with considerable experience in treating patients with AIDS. (Tr. 89-91.) There is no evidence that the decision made by SWBT in not allowing Hilton to return to the work place was the result of some stereotyping or archaic attitudes or that SWBT merely applied a blanket exclusion to Hilton. Rather it is clear from the substantial record developed on Hilton's medical condition that the decision was in fact a highly individualized, fair and medically reasonable decision.

III. THE FIFTH CIRCUIT MET ITS OBLIGATIONS UNDER *ERIE* BY APPLYING TEXAS LAW TO ITS ANALYSIS OF THIS CASE

As shown above, the Texas Supreme Court expressly rejected the definition and, by logical extension, the value of the cases interpreting the definition of individual with handicap under the Rehabilitation Act. There is no question that, in drafting handicapped employment discrimination laws, states are free to adopt more restrictive language than is employed in the Rehabilitation Act.

(a) The Fifth Circuit was Faithful to the Act

It is clear from the Fifth Circuit opinion that the court was scrupulously faithful to the Act. Section IV, Subsections A and B, of the opinion is a well-reasoned analysis of the text of the Act. The court examined in detail the definitions at issue in this case. Given the definitions of "handicap" and "handicapped person" set out in the Act, the court was correct in construing Sections 2.01(7)(A) and (B) of the Act as pertaining to mental and physical impairments, as opposed to mere pathological conditions. The court's summary in this regard is consistent with the clear meaning of the text of the Act.

> Thus, a proper application of the *ejusdem generis* rule leads us to conclude that, other than the particular physical conditions identified in the list [of illustrative handicaps], the only physical conditions capable of constituting a "handicap" for purposes TCHRA are those which may properly be classified as *physiological* health impairments. Every individual condition in the nonexclusive list is a physiological health impairment, so any "other" condition must be a physiological impairment if it is to be deemed a handicap under TCHRA.

Hilton, 936 F.2d at 828. In support of the propriety of applying the *ejusdem generis* rule to statutory interpretation, the Fifth Circuit cited a federal district court case. The court could have as easily cited Texas court decisions applying this rule to statutory interpretation. *County of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978)(interpreting "special defect" under the Texas Tort Claims Act);

and, *Hightower v. State Com. of Education*, 778 S.W.2d 595, 598 (Tex. App. – Austin 1989, no writ)(interpreting "other full-time professional employee" under Texas Term Contract Renewal Act).

As Hilton clearly has no such physiological condition, he cannot be deemed to be handicapped under the Act. *Hilton*, 936 F.2d at 829. Hilton's real objection to the court's analysis is that it did not conform to the standard used in the federal cases construing the Rehabilitation Act. Yet, as seen above, that standard was expressly rejected by the Texas Supreme Court in *Chevron*. *Chevron*, 745 S.W.2d at 317-318.

(b) The Fifth Circuit Considered the Opinion of the Texas Attorney General Interpreting the Act

The Attorney General's opinion cited by Hilton [Tex. Atty. Gen. Op. No. JM-648 (March 19, 1987)] also fails to provide authority for Hilton's contention that he is a "handicapped person." The Attorney General's opinion was written *prior* to the *Chevron* decision. In that opinion, the Attorney General makes two conclusions which are flatly rejected by the Texas Supreme Court in the *Chevron* decision: (1) that a person states a viable cause of action under the Act if he shows that the employer *perceived* him to be handicapped "regardless of whether the person is actually handicapped"; and, (2) that the Rehabilitation Act is authority for interpreting the Act. Both of these critical points in the opinion were totally refuted by the *Chevron* court. *Chevron*, 745 S.W.2d at 316 and 318.

The Attorney General's opinion was entirely based on this Court's opinion in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), which found that an elementary school teacher with tuberculosis was a "handicapped individual" under the Rehabilitation Act. The *Arline* decision is consistent with the broader language and standards applicable to the Rehabilitation Act which are not applicable to the Act at issue here. *Id.*, 480 U. S. at 280-281.[7] Thus, the Fifth Circuit only rejected the Attorney General's opinion because it was inconsistent with the opinion of the Texas Supreme Court in *Chevron*.

(c) The Fifth Circuit was Faithful to Texas Case Law

Hilton argues that the Fifth Circuit abandoned its *Erie* obligations because it failed to heed the direction of the Texas Supreme Court in the *Chevron* decision that "[t]he question of whether a person is 'handicapped' is generally a question of fact for the fact finder." Hilton is either arguing that this language always makes summary judgment inappropriate under the Act or that this language makes summary judgment appropriate only when

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[7] As footnote 7 of the *Arline* opinion makes clear, the Court found that the plaintiff had a history of physical impairment within the broad definition of the Rehabilitation Act and did not decide the issue of whether an asymptomatic disease carrier (such as a person with the AIDS virus) would be considered as having a physical impairment or the issue of whether a person would be deemed handicapped simply by virtue of having a contagious disease. *Arline*, 480 U.S. at 282 n.7.

it is a question of the severity of the alleged impairment. Neither argument is correct.

The *Chevron* decision itself disproves the first contention that summary judgment is always inappropriate. In *Chevron*, the Texas Supreme Court held *as a matter of law* that the physical impairment in question in that case, the plaintiff's vision problem, was not severe enough to merit protection under the Act.

The second contention is also not supported by the *Chevron* decision. Nothing in the court's opinion can be construed as limiting the analysis of the record on motion for summary judgment relative to a person's claim to handicap status under the Act to the severity issue. Moreover, the court's use of the word "generally" patently demonstrates that there are exceptions to the necessity of submitting the issue to the finder of fact. In Ms. Redmon's case, it was the clear lack of the severity of the physical impairment. In Hilton's case, it is the fact that the condition was neither a physiological nor a mental impairment and, as such, fell outside of the definition of "handicap" employed in the Act.

Interestingly, the Fifth Circuit also understood that Hilton's disabilities did not constitute a *severe* impairment of the kind intended to come under the protection of the Act. *Hilton*, 936 F.2d at 832. Thus, even if Hilton were correct in asserting that the *Chevron* decision limits summary judgments to cases raising the issue of the severity of the impairment, his argument that the Fifth Circuit failed to apply Texas law is again without merit.

Hilton's reliance on the decision in *Finney v. Baylor Medical Center Grapevine*, 792 S.W.2d 859 (Tex. App. – Ft.

Worth 1990, writ ref'd), is also misplaced. In *Finney*, the question on the defendant's motion for summary judgment was whether the plaintiff had a physical or mental impairment or an emotional condition. The plaintiff's condition was medically described as "Bipolar Affective Disorder (manic depression)." *Id.*, at 860. In that case, the court expressly found that the movant did not meet the standard for summary judgments under Texas practice. The court held that

> [t]he record contains no evidence which conclusively establishes that manic depression is specifically an "emotional" condition, nor does the record reflect the existence of the "physical," "emotional" and "mental" distinctions upon which Baylor bases its argument. Thus, the proper categorization of Finney's condition is a fact issue which remains undecided.

Finney, 792 S.W.2d at 860.

Under Texas law, the standard for summary judgment is stricter than under federal practice and the Texas courts do not follow the standard set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Casso v. Brand*, 776 S.W.2d 551, 555-556 (Tex. 1989)(ruling in *Celotex* expressly disallowed for motions for summary judgment under Texas procedure).[8] Under Texas procedure, the defendant

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[8] In *Gates v. Dow Chemical Co.*, 777 S.W.2d 120 (Tex. App. – Houston [14th Dist.]), *vacated, set aside, dism'd*, 783 S.W.2d 589 (Tex. 1989), the appellate court attempted to distinguish the holding in *Casso*; however, as the case was settled between the parties after the Texas Supreme Court granted an application for writ of error, it cannot be said with certainty that the appellate court was successful.

must actually establish that there exists no genuine issue of material fact and, unlike the *Celotex* standard, there is not a burden on the non-moving party to make a showing sufficient to establish the existence of an essential element of his case. *Celotex*, 477 U.S. at 322; *Casso*, 776 S.W.2d at 556. The court in *Finney* did not hold that the defendant was wrong in contending entitlement to summary judgment based on the argument that "emotional conditions" were not covered by the Act. Rather, the court held that the defendant did not establish with certainty that the plaintiff had an emotional condition, as opposed to a physical or mental condition.

The instant case was decided under federal procedure. Fed. R. Civ. P., Rule 56. No evidence was offered which showed that Hilton suffered from a severe physical impairment of the kind which would fall under the definition of "handicap" used in the Act. As such, the trial and appellate courts were correct in finding in favor of SWBT on its motion for summary judgment.

CONCLUSION

The record in this case establishes beyond dispute that the Fifth Circuit properly applied Texas law to the issues on appeal, that Hilton is not a handicapped person under the Act, and that Hilton's condition impaired his ability to reasonably perform the job in question. Given this record, Hilton's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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